

Letter of Findings Number: 04-20130108
Sales/Use Tax
For Tax Years 2009-2011

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ISSUES

I. Sales/Use Tax—Packaging.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-9; IC § 6-8.1-5-1.

Taxpayer protests the Department's proposed assessment of use tax on packaging materials.

II. Sales/Use Tax—Construction Contracts.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-9; [45 IAC 2.2-3-9](#); [45 IAC 2.2-4-22](#).

Taxpayer protests the Department's refund denial on amounts paid toward certain construction contracts.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer was audited by the Indiana Department of Revenue ("Department"). As a result of the audit, the Department determined that Taxpayer owed additional use tax and interest. Following the audit, Taxpayer filed a protest relating to certain items claimed to be used as nonreturnable packaging.

Separately, during the course of the Department's audit, Taxpayer noted that it had self-assessed use tax on transactions related to certain construction contracts. Taxpayer requested a refund on the use tax paid. Taxpayer's refund request was not granted. However, Taxpayer was not assessed on similar transactions on which Taxpayer did not self-assess use tax. A hearing was held and this Letter of Findings results. Further facts will be supplied as required below.

I. Sales/Use Tax—Packaging.

DISCUSSION

Taxpayer protests the assessment of use tax on shipping cartons. The Department's audit noted that certain items were included under an account designated "warehouse transfers" and—based on a sample—assessed Indiana use tax on items on which Taxpayer did not remit sales or use tax (or, if Taxpayer remitted sales or use tax to another jurisdiction, the difference between Indiana's use tax rate and the other jurisdiction's sales tax rate).

At the outset, the Department notes that the burden of proving a proposed assessment is wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). Regarding sales and use tax, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-2-1; IC § 6-2.5-3-2.

For the years in question, IC § 6-2.5-5-9(d) provided:

Sales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for selling the contents that he adds.

Even though the packaging materials was listed as being in an account of otherwise taxable items, Taxpayer asserts that it purchased boxes, cartons, and tape for use as packaging materials to ship property such as books to third parties. Taxpayer has provided sufficient legal and factual grounds to permit further review of the exact use of the packaging materials. Taxpayer shall provide the Department the usage of the packaging materials (i.e., Taxpayer's own use or for shipping to third parties) within forty-five (45) days of issuance of this Letter of Findings. Taxpayer's protest is sustained to the extent the materials are used in shipping property to third parties and otherwise denied.

FINDING

Taxpayer's protest is sustained to audit verification.

II. Sales/Use Tax—Construction Contracts.

DISCUSSION

Taxpayer protests the denial of use tax credit and sales tax refund on the amounts of certain construction contracts. Taxpayer asserts that it enters into contracts with educational institutions to sell books and other merchandise. As part of the contracts, Taxpayer agreed to pay a stated amount for real estate improvements to facilities owned by the educational institutions. Taxpayer in turn would contract with a third-party contractor ("Contractor") for the necessary improvements. Contractor billed the improvements as time and materials contracts. The issue is whether Taxpayer can invoke the educational institution's tax-exempt status in determining whether the construction charges were subject to sales and use tax.

In general, IC § 6-2.5-2-1 imposes sales tax on retail transactions in Indiana. IC § 6-2.5-3-2 imposes use tax on tangible personal property purchased in retail transactions. In the case of a time-and-materials contractor, the

Department treats the contractor as a retail merchant when it sells the materials to the contractor's customer. See [45 IAC 2.2-3-9\(d\)\(1\)](#); [45 IAC 2.2-4-22\(d\)\(1\)](#).

For a sales tax exemption to apply, an entity claiming the exemption—such as an educational institution—generally cannot pass through an exemption to another entity for purchases by the other entity. But see IC § 6-2.5-4-9(b) (permitting a passthrough of an exemption on lump-sum contracts when the real-estate purchaser could have purchased materials exempt). In this case, Taxpayer is purchasing construction materials from Contractor. Even though the educational institution receives the ultimate benefit—and would have been able to purchase the materials tax-exempt—Indiana law does not permit taxpayer to recognize or use the educational institution's tax exemption for Taxpayer's benefit in this instance.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is sustained subject to audit verification with regard to Issue I and denied with regard to Issue II.

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